North American Dismantling Corp., North American Demolition Corp. *and* Jeffrey G. Powell. Case 7–CA–39923

April 30, 2004

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This case, on remand from the United States Court of Appeals for the Sixth Circuit,[1] presents the issue of whether the Respondent established an affirmative defense under *Wright Line*[2] that Jeffrey Powell, who was discharged on May 9, 1997,[3] would have been denied reemployment on May 22, on the basis of his misconduct even in the absence of his protected, concerted activity.

The Board's original decision, reported at 331 NLRB 1557 (2000), adopted an administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by its discharge on May 9 of three employees: Jeffrey G. Powell, Robert W. Giltrop, and Jayson Zeitz. The Board also ordered the Respondent to offer the discharged employees reinstatement and make them whole for any loss of earnings and other benefits they may have suffered as a result of the unlawful discharges.

On cross-petitions for enforcement and review, the court, on April 12, 2002, affirmed the Board's findings and conclusions as to employees Giltrop and Zeitz. The court agreed that Giltrop, Zeitz, *and* Powell had engaged in protected activity on May 9, and that, based on statements by Supervisor Daniel Borashko, they had a reasonable basis to believe they had been fired.[4] The court denied enforcement as to Powell, however, holding that the "NLRB had failed to make any finding as to the Companies' affirmative defense" that "Powell would have been fired for attempting to steal company business even had he not engaged in protected concerted activity." 35 Fed. Appx. at 138.

On August 29, 2002, the Board advised the parties that it had decided to accept the court's remand and invited the parties to file statements of position regarding the issue raised by the court's remand. The General Counsel and the Respondent filed statements of position.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

We have reviewed the entire record, including the parties' statements of position,[5] in light of the court's remand, which the Board accepts as the law of the case. We adhere to our original holding that Powell was discharged on May 9 for engaging in protected concerted activity. We find merit in the Respondent's affirmative defense, however, to the extent that we conclude, as explained below, that the Respondent has established that it would have denied reemployment to Powell on May 22 because he had attempted to steal company business. Accordingly, as the court contemplated, we find that "Powell is only entitled to back wages for the period between being fired at the job site and requesting employment [on May 22] in his call to Marcicki's office." 35 Fed. Appx. at 138.

The Respondent's *Wright Line* Defense

At the outset, we note that the court remanded for consideration of the issue of whether Powell would have been terminated on May 9, 1997, on the basis of his alleged misconduct even in the absence of protected activity. As to that issue, we conclude that the Respondent's defense fails. The Respondent did not learn of Powell's alleged misconduct until after May 9. Thus, that alleged misconduct played no role in the discharge of May 9.

However, by the time of Powell's request for rehire (May 22), the Respondent was aware of Powell's alleged misconduct. If that misconduct was, by itself (i.e., apart from Powell's union activity), the basis for the refusal to rehire, then Powell is only entitled to back wages for the period between May 9 and 22.

We find merit in the Respondent's position on this "affirmative defense."

The Respondent's affirmative defense is based on conversations that Powell had at the jobsite with Richard Christie of Christie Construction Company, one of the Respondent's clients, on the morning of May 9, the day Powell was discharged. Powell complained to Christie that the job was nonunion and that the employees should be paid union scale. In that same conversation, Powell also told Christie that he could do the job for less than Christie was paying the Respondent. He said that he could "put some people together and do this job for you for cash." Five or six times that same morning, Powell repeated this offer to take over the job from the Respondent.

[1] *North American Dismantling Corp. v. NLRB*, 35 Fed. Appx. 132 (2002) (unpublished decision); 170 LRRM (BNA) 2224 (2002).

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

[3] All subsequent dates are 1997 unless indicated otherwise.

[4] The court's enforcement of the Board's Order as to employees Giltrop and Zeitz was finalized by the court's judgment, dated May 22, 2002.

[5] Neither of the parties requested the record be reopened.

Later on May 9, Donald Borashko, Respondent's supervisor, came to the jobsite, where he had a confrontation with Powell and the other employees about their wage rates. That confrontation led to their unlawful termination, after Borashko told the employees that if they did not like their pay scale, they should leave and find another job. Borashko admitted at trial that he did not learn of Powell's attempt to wrest the job from the Respondent until after the three crewmen had left the jobsite.

On May 22, Powell telephoned the Respondent's owner and president, Rick Marcicki, seeking work. By then Marcicki had learned of Powell's attempt to take the job away from the Respondent.[6] Powell spoke only with Marcicki's secretary, Toni Francis. After she told Marcicki that Powell was on the phone, Francis informed Powell that Marcicki was busy, that he had no time to talk to Powell, and that Powell no longer had a job with the Respondent.

The Respondent contends that it was Powell's repeated attempts to "steal" work from the Respondent that led Marcicki on May 22 to deny Powell's inquiry about rehire, that this is the only reason for its refusal to rehire Powell, and that this was the primary reason stated in a June 25 letter to the Michigan Employment Security Board challenging Powell's claim for unemployment benefits. The Respondent contends that Powell's numerous attempts to steal this job from his employer by offering to do the job for less for cash, and with a crew that Powell was to provide was an act of disloyalty that violated its employee rules and warranted the Respondent's refusal to rehire him.

The General Counsel asserts that he has met his burden of showing that Powell's protected concerted activity was the motive for his discharge on May 9 and that this remained the reason why he was refused rehire on May 22. The General Counsel relies on the judge's finding that on May 22 Marcicki failed to mention Powell's attempt to steal work from the Company as a reason for not rehiring him. The General Counsel also points out that in the Respondent's letter to the Michigan Employment Security Board, the Respondent also gave as a reason for discharge that Powell "incited other employees to walk off the job and refuse to work." Therefore, the General Counsel contends, the Respondent has not satisfied its affirmative *Wright Line* burden to show that it would have refused to rehire Powell on May 22 even in the absence of any protected activity.

[6] Marcicki became aware of Powell's conversations with Christie when Marcicki visited the jobsite on the afternoon of May 9 after the crewmen had departed.

Analysis

The court upheld the Board's determination that Powell and the other employees were unlawfully terminated by Borashko at the jobsite on May 9. 35 Fed. Appx. at 137. The issue on remand then is whether the Respondent has established a *Wright Line* defense that it would not have rehired Powell on May 22 for legitimate reasons, because by then Marcicki had learned of Powell's misconduct in seeking to take work from the Respondent. As the court stated, Powell's "misconduct could have been the basis for the Companies' refusal to re-hire him." Id. at 138.

As the court discussed, in mixed-motive cases like this one, to sustain its defense under *Wright Line*, an employer must show that it would have taken the same adverse action regardless of the employee's protected activities. It does not have to prove that the adverse action was based solely on legitimate grounds, to the exclusion of any unlawful motivation.

It is well settled that Section 7 of the Act does not protect employee overtures to contractual interference. See *ATC/Forsythe & Associates, Inc.*, 341 NLRB No. 66 (2004); *Kenai Helicopters*, 235 NLRB 931, 936 (1978); *Associated Advertising Specialists, Inc.*, 232 NLRB 50, 54 (1977).[7] To the extent that Powell sought to replace the Respondent with a crew he would provide and thereby interfere with its business relationship with Christie, he was clearly engaged in unprotected conduct. The Respondent's June 25 letter to the Michigan Employment Security Board and its employee handbook (as testified to by Marcicki at the unemployment hearing) support the Respondent's argument that it considers solicitation of a customer grounds for termination and that Powell's solicitation would have been grounds to refuse him reemployment. Accordingly, we find that the Respondent has met its *Wright Line* burden of establishing that its refusal to rehire Powell on May 22 would have occurred for legitimate reasons regardless of his May 9 protected activities.

Our colleague argues that the Respondent's burden was to prove that the discriminatee engaged in misconduct for which the Employer would have disqualified any employee from continued or future employment. She concludes that the burden was not met. However, the law of the case is that the Respondent simply had to show that it would have refused to hire Powell for his effort to steal work from the Respondent even if Powell had not been a union adherent. We conclude that Powell's effort to steal work was an act of disloyalty, and that

[7] See also *Mountain Shadows Golf Resort*, 338 NLRB No. 73 (2002).

the Respondent would have refused to employ such a disloyal person, irrespective of union activity.

Our colleague states that the record contains scant evidence that the Respondent had an express policy or any past practice for dealing with attempts to steal business, and she notes that the record contains no evidence that the Respondent had previously confronted a similar situation.

With respect to the quantum of evidence, we note that all of the evidence that was introduced was to the effect that the Respondent considered solicitation of a customer grounds for termination. No evidence was introduced to contradict either the Respondent's June 25 letter or Marcicki's testimony on this point at the unemployment hearing. Thus, the affirmative evidence (that the Respondent proscribed the type of conduct engaged in by Powell), is unrebutted. Nor is this point vitiated by the fact that the Respondent had not previously confronted such conduct on the part of an employee. The fact that no employee has previously engaged in such quintessentially disloyal conduct cannot be used to force the Respondent to hire such a disloyal person.

Our colleague also relies on the fact that, in the May 22 telephone conversation during which Powell was informed that he no longer had a job with the Respondent, Powell's attempt to steal work from the Respondent was not mentioned. However, Marcicki testified that he was in the midst of preparing a bid due the next day when Powell called. As noted above, Powell spoke only with Marcicki's secretary, Toni Francis. After conferring briefly with Marcicki, she returned to the telephone and told Powell that Marcicki was busy and had no time to talk to Powell, and that as far as Marcicki was concerned, Powell no longer had a job with the Respondent. In these hectic circumstances, where Marcicki was communicating with Powell via support personnel, we do not ascribe great significance to Marcicki's failure to mention Powell's attempt to steal the Respondent's business.

On this basis, we find that Powell is not eligible for reinstatement and, in keeping with the court's remand, any backpay will be limited to the period between May 9 when he was unlawfully discharged and May 22 when the Respondent refused to rehire him.[8]

Accordingly, we shall order the Respondent to make Jeffrey Powell whole by paying him limited backpay for the period given above.[9]

ORDER

The National Labor Relations Board orders that the Respondent, North American Dismantling Corp. and North American Demolition Corp., Lapeer, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise disciplining their employees because of their exercise of protected activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Jeffrey G. Powell whole for any loss of earnings and other benefits suffered as a result of the discrimination against him for the period from May 9 to 22, 1997.

(b) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at their facility in Lapeer, Michigan, copies of the attached "Appendix"[10] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents

[8] Because we accept the court's decision as the law of the case, we have analyzed the failure to rehire Powell under *Wright Line*, as instructed by the court's remand order. We, therefore, need not reach the remedial issue posed by the dissent under *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994).

[9] Pursuant to Rule 19 of the Federal Rules of Appellate Procedure, the court's judgment enforced the Board's original Order as to Robert W. Giltrop and Jayson Zeitz. Therefore, we have provided a new Order and Notice specifically relating solely to Jeffrey Powell.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 13, 1997.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps taken to comply with this Order.

Dated, Washington, D.C. April 30, 2004

Robert J. Battista, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting in part.

I accept the court's decision as the law of the case. Respectfully, however, I disagree as to the proper inquiry on remand. The majority analyzes the issue under *Wright Line*:[1] whether the Respondent has met its burden to prove that it would have refused to rehire Powell even absent his protected activity. That issue is one of liability, however, and the complaint did not allege that the Respondent violated the Act by refusing to rehire Jeffrey Powell on May 22. Rather, the relevant inquiry is more accurately analyzed as remedial: whether in light of after-acquired evidence (i.e., knowledge of Powell's attempt to "steal" the Respondent's business) the Respondent is required to offer reinstatement to Powell, who it unlawfully terminated, and give him full backpay. See, e.g., *Smucker Co.*, 341 NLRB No. 10, slip op. at 2 (2004). In my view, it is.

It is well established that, if an employer claims a discriminatee is not entitled to reinstatement and full backpay, it is the employer's burden to prove that the discriminatee engaged in misconduct for which the employer would have disqualified any employee from continued or future employment. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994). The employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy and any ambiguities will be resolved against the employer." *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990). The Board will not infer or assume that an employer would have disqualified an individual based on the nature of his misconduct. Id.

In my view, the Respondent has not met its burden of proof: it has not proven that Powell engaged in misconduct for which it would have disqualified any employee from continued or future employment. Rick Marcicki testified at the unfair labor practice hearing that "we have rules," and "that there are certain rules you don't break." (Tr. 290.) But no rules were placed in evidence. His testimony at the unemployment compensation hearing was placed in evidence. There he referred to written rules making solicitation of customers grounds for termination, but, again, no rules were placed in evidence. The record, therefore, contains scant evidence that the Respondent had an express policy (e.g., a noncompetition or duty of loyalty policy) or any past practice for dealing with attempts to "steal" business. The record contains no evidence that the Respondent had previously confronted a similar situation.

Significantly, once faced with the situation, the Respondent did not rely on the conduct in refusing to rehire Powell. While Marcicki was aware of Powell's conduct by May 22, no mention of the conduct was made to Powell in denying his request for work. Apparently, the first that the conduct was raised was before the Michigan Unemployment Security Board. But neither that testimony nor Marcicki's testimony at the unfair labor practice hearing, quoted above, are sufficient to sustain the Respondent's burden of proof, as articulated in *Marshall Durbin*, supra, and *John Cuneo*, supra. Indeed, even after the court's remand on the issue of Powell's entitlement to reinstatement, the Respondent made no request that the record be reopened so that it could introduce evidence demonstrating, in accordance with Board precedent, that Powell's conduct would have been grounds for termination based on a preexisting lawfully applied company policy.

Accordingly, I would affirm the Board's original remedy requiring that Powell be reinstated and given full backpay.

Dated, Washington, D.C. April 30, 2004

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

[1] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discipline our employees because of their exercise of protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL make Jeffrey G. Powell whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest for the period from May 9 to 22, 1997.

NORTH AMERICAN DISMANTLING CORP.,
NORTH AMERICAN DEMOLITION CORP.